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NEW YORK STATE PAID SICK LEAVE FOR RESTAURANT & HOSPITALITY WORKERS

All private sector workers in New York State, including restaurant and hospitality workers, are now covered under the state's new sick and safe leave law, regardless of industry, occupation, part-time status, overtime exempt status, and seasonal status.

The law requires employers with five or more employees to provide their employees with paid sick and safe leave. Businesses with fewer than five employees and a net income of \$1 million or less must provide unpaid sick and safe leave to employees.

KEY DATES

- **September 30, 2020:** Covered employees in New York State will start to accrue leave at a rate of one hour for every 30 hours worked.
- **January 1, 2021:** Employees may start using accrued leave.

AMOUNT OF LEAVE

Employees will receive an amount of sick leave depending on the size of their employer:

Number of Employees	Employer Sick Leave Requirements
0 - 4	If net income is \$1 million or less in the previous tax year, the employer is required to provide up to 40 hours of unpaid sick leave per calendar year.
0 - 4	If net income is greater than \$1 million in the previous tax year, the employer is required to provide up to 40 hours of paid sick leave per calendar year.
5 - 99	Up to 40 hours of paid sick leave per calendar year.
100+	Up to 56 hours of paid sick leave per calendar year.

A January 1 – December 31 calendar year must be used for purposes of counting employees. Small employers who reported net income of less than \$1 million do not need to pay their employees sick leave, but must provide the additional allotted leave time. For other purposes, including use and accrual of leave, employers may set a calendar year to mean any 12-month period.

ARE EMPLOYERS REQUIRED TO PAY EMPLOYEES FOR LOST TIPS AND GRATUITIES DURING LEAVE TIME?

No. Employers are not required to pay employees for lost tips or gratuities, but employers may not take a tip credit for leave time and must pay the employee their normal rate of pay or the applicable minimum wage, whichever is greater.

CAN A BUSINESS IN THE HOSPITALITY INDUSTRY THAT NORMALLY PAYS EMPLOYEES A TIPPED WAGE (ALLOWING FOR A TIP CREDIT/ALLOWANCE) PAY THAT SAME RATE WHEN EMPLOYEES USE SICK LEAVE?

No. Any employer who normally utilizes a tip allowance as a credit against the minimum wage requirements of their industry (e.g., in accordance with the Hospitality Industries Wage Order) cannot do so for employees' accrued sick leave. The rate of pay must be consistent with the applicable statutory minimum wage applicable to the employee.

HOW DO EMPLOYEES WHO ARE PAID ON A COMMISSION, FLAT RATE BASIS, OR OTHER NON-HOURLY BASIS ACCRUE SICK LEAVE?

When employees are paid on a non-hourly basis, accrual of sick leave is measured by the actual length of time spent performing work.

WHAT IF AN EMPLOYEE IS PAID AT DIFFERENT RATES FOR DIFFERENT TASKS?

Employees who are paid at more than one rate of pay must be paid for leave under the law at the weighted average of those rates. The weighted average is the total regular pay divided by the total hours worked in the week. Overtime exempt employees who are paid on an hourly basis are assumed to work 40 hours per workweek, when deriving their regular rate unless the terms and conditions of the employment specify or require otherwise. However, as noted above, employers are prohibited from reducing an employee's rate of pay for leave time hours only.

IF AN EMPLOYER HAS BEEN ORDERED TO CLOSE TEMPORARILY DUE TO A PUBLIC HEALTH EMERGENCY, MAY EMPLOYEES USE ACCRUED SICK LEAVE DURING THE PERIOD OF CLOSURE?

Whether the usage of sick leave in this scenario would be fact specific depending on the type of health emergency, including the risk of contagion, and other health considerations. Accrued sick leave may be used by an employee for preventive care of a mental or physical illness, injury or health condition.

Sick leave under this law is separate and additional to the quarantine leave for employees subject to a precautionary or mandatory order of quarantine or isolation related to COVID-19 (Ch. 25 of the laws of 2020), and use of COVID-19 leave does not impact or otherwise utilize an employee's paid sick leave accruals or usage. More information on COVID-19 Leave is available at paidfamilyleave.ny.gov/covid19.

DOES AN EMPLOYEE'S IMMIGRATION STATUS AFFECT WHETHER THEY ARE ENTITLED TO SICK LEAVE UNDER THE LAW?

No. An employee's immigration status has no effect on their eligibility for sick leave benefits under this law.

IF A BUSINESS WITH 15 FULL-TIME, YEAR-ROUND EMPLOYEES ALSO HIRES SEASONAL PART-TIME WORKERS, MUST THE EMPLOYER PROVIDE SICK LEAVE TO THESE PART-TIME SEASONAL WORKERS AS WELL?

Yes. For the purposes of this law, an employee is defined as "any person employed for hire by an employer in any employment." If an employer has five or more employees but fewer than 100, all employees, including part-time seasonal workers, are entitled to accrue one paid sick hour for every 30 hours they work.

IF AN EMPLOYEE USES LEAVE DURING HOURS THAT WOULD HAVE BEEN OVERTIME IF WORKED, DOES THE EMPLOYER HAVE TO PAY THE OVERTIME RATE OF PAY?

No. Employees are required to be paid their normal pay for leave time under the law.

CAN AN EMPLOYER REQUIRE THAT AN EMPLOYEE LOCATE A REPLACEMENT WORKER TO COVER A SHIFT/ JOB IF THE EMPLOYEE ELECTS TO USE THEIR SICK LEAVE?

No. So long as an employee is using the sick leave for one of the reasons prescribed under the law, an employer may not require any additional preconditions.

WHAT DO I DO IF MY EMPLOYER ISN'T PROVIDING ME WITH SICK LEAVE AS REQUIRED BY THE LAW?

Employees may file a complaint with the Department of Labor by calling **888-469-7365**.

For more information about New York State's Paid Sick Leave, including additional FAQs, regulations, and more, please visit ny.gov/paidsickleave.